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No. 82-136

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1981

AMBASSADOR COLLEGE,

Petitioner,

v.

SALLY J. GEOTZKE, etc., et al.,

Respondents.

PETITIONER'S REPLY MEMORANDUM

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The Brief for Respondent in Opposition makes several misleading or mistaken assertions to which a short reply is warranted:

1. Petitioner takes serious issue with the majority of the factual assertions set forth in respondents' brief, including, but not limited to, whether the Petitioner made a sufficient showing that it was entitled to assert its constitutional objections; whether the

objections were timely asserted; and whether petitioner is merely seeking a review and reversal of the final judgment of the Supreme Court of Georgia. Quite obviously, these are proper matters to be resolved by an examination of the record in the state court proceedings. The district court below rendered its decision on motions submitted by respondents prior to the filing of any defensive pleadings. Therefore, the only record on appeal in this case is that of the district court complaint, motions to dismiss and supportive briefs. Since this case reached the court below on an appeal from the grant of a Motion to Dismiss, the allegations in the complaint are deemed admitted by Respondents. Radovich v. National Football League, 352 U.S. 445 (1957).

2. The issue on this appeal is not whether the district court below lacks subject matter jurisdiction of the claims presented in petitioner's complaint. Indeed, the court below did not reach this question. Rather, the court of appeals held that as this was a purely secular dispute, petitioner had no colorable first amendment claim. Ambassador College v. Geotzke, 675 F.2d 662, 663 (1982). Nevertheless, Respondents totally unwarranted assertions on the jurisdictional issue can be treated in short order.

Petitioner agrees with Respondent that state courts, like federal courts, are given the right and duty to decide federal questions and protect the rights of litigants under the Constitution of the United States. However, when state courts fail in their duty to exercise

this authority so as to cause a litigant to suffer judgment solely for asserting and relying upon his constitutional freedoms, a different rule is required. The clear purpose of 42 U.S.C. § 1983 is to provide a remedy to an unsuccessful litigant under such circumstances; that is:

> . . . to interpose the federal courts between the states and the people, as guardians of the people's federal rights . . . to protect the people from unconstitutional action under color of state law, 'whether that action be executive, legislative or judicial.' Mitchum v. Foster, 407 U.S. 225, 242, 92 S.Ct. 2151, 2162, 32 L.Ed. 2d 705, 717 (1972). (Emphasis supplied)

Petitioner is fully aware of the cases cited by Respondent suggesting that federal district courts have no jurisdiction to review the judgment of a state court. Petitioner respectfully submits that these cases are concerned only with the exercise of jurisdiction rather than the pure existence of jurisdiction. Even

as to the exercise of jurisdiction, the cases cited by respondent are clearly distinguishable from our case since the state courts failed to acknowledge the existence of the constitutional issues raised by petitioner's complaint, the constitutional privilege itself, and the accompanying protections to be afforded a civil litigant that is resisting discovery by relying on a proper assertion of the privilege. Since the issues raised by Petitioner's complaint in this case have yet to be lawfully considered and adjudicated upon their merits, the district court does not lack subject matter jurisdiction even in the sense of the exercise rather than the existence of jurisdiction.

CONCLUSION

For the foregoing reasons, and for

the reasons stated in its earlier Petition, petitioner respectfully urges the Court to grant the Writ of Certiorari.

Respectfully submitted,

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